

EXPLANATORY MEMORANDUM TO

The Race Relations Order (Amendment) Regulations (Northern Ireland) 2009

SR No. 410

1. Introduction

- 1.1. This Explanatory Memorandum has been prepared by the Office of the First Minister and Deputy First Minister to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.
- 1.2. The Statutory Rule is made under section 2(2) of the European Communities Act 1972 and is subject to the negative resolution procedure.

2. Purpose

- 2.1. These Regulations amend the definition of indirect discrimination in Article 3(1A)(b) of the Race Relations (Northern Ireland) Order 1997 ("the 1997 Order"). The effect of the Regulations is to put beyond any doubt that indirect discrimination on racial grounds would cover the 'deterred applicant' (i.e. a person who is put off applying for a job or using a service etc for which they are otherwise qualified because of an implication that they will be discriminated against should they attempt to do so) as much as it covers the person who actually applies for the job or service and is then discriminated against.

3. Background

- 3.1. Council Directive 2000/43 EC ("the Race Directive") implements the principle of the equal treatment between persons irrespective of racial or ethnic origins, in the areas of employment (and related matters), social protection, social advantage, education and access to and supply of goods and services which are available to the public, including housing. Member States of the European Union were required to transpose the Race Directive into domestic law by 19 July 2003.
- 3.2. Much of the necessary domestic legislation was already in place in the form of the 1997 Order. However, where additional changes to the law were needed to complete transposition of the Race Directive, these were done by the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 (SR No. 341) ("the 2003 Regulations").
- 3.3. The 1997 Order, as it was originally enacted, already contained a definition of indirect discrimination in Article 3(1)(b). However, the Race Directive introduced a different definition of indirect discrimination that subsequently had to be transposed into domestic legislation. A new definition of indirect discrimination, based on the Race Directive definition, was therefore inserted into Article 3 of the 1997 Order 1997 by the 2003 Regulations (as Article 3(1A)).
- 3.4. However, when the European Commission subsequently considered how the UK had transposed the new definition of indirect discrimination into domestic legislation, it came to the conclusion that the transposition actually failed to transpose the new indirect discrimination provisions of

the Race Directive correctly. The Commission then issued a notice, Reasoned Opinion Infringement No 2005/2363 ("the Reasoned Opinion"), on 27 June 2007 stating the reasons why it considered that the UK had incorrectly transposed the relevant provisions of the Race Directive.

- 3.5. In its response to the Reasoned Opinion of 24 August 2007, the UK Government agreed to make further amendments to domestic legislation to address the Commission's concerns regarding the transposition of the indirect discrimination provisions. These amending Regulations give full effect to the Reasoned Opinion in Northern Ireland.
- 3.6. Indirect discrimination on the grounds of race is prohibited under both European and domestic law. Indirect discrimination broadly occurs when a provision, criterion or practice that prima facie appears neutral has a disproportionately adverse effect on a class of persons protected under discrimination law. Any such provision, criterion or practice is, however, not unlawful if it can be objectively justified. For example, a requirement by an employer that her staff are clean shaven (a 'no beards policy') while applying to all staff equally and so appearing to be neutral, would in fact adversely affect Sikhs. A Sikh employee who was dismissed because he refused to shave could bring a claim for indirect discrimination and it would be for the employer to show that the no beards policy could be objectively justified.
- 3.7. Article 2(2)(b) of the Race Directive covers the example given above. It also covers the situation where a person is deterred from even applying for a job for which he is qualified. Using the Sikh example - if a Sikh man sees an advert for a job for which he is qualified, but he does not apply for it because he knows that the company operates a no beards policy which would prevent him getting the job, he could bring a claim for indirect discrimination. (Again it would be for the employer to show that the no beards policy could be objectively justified).
- 3.8. It is important to note that Article 2(2)(b) of the Race Directive is not intended to cover allegations of purely hypothetical indirect discrimination, for example by a person who never intended to apply for the job or would not be qualified for it, irrespective of the discriminatory requirement. In its Reasoned Opinion, the Commission was concerned that the definition of indirect discrimination in UK legislation, including the 1997 Order, did not cover the situation outlined above; ie the deterred applicant situation.
- 3.9. In order to ensure clarity and to address the European Commissions' concerns, these Regulations amend Article 3(1A) of the 1997 Order to make clear that its provisions cover both individuals who are put at a disadvantage by a discriminatory provision, criterion or practice and also those that would be put at such a disadvantage. The amendment does not however cover purely hypothetical situations.

4. Consultation

- 4.1. The 2003 Regulations which gave effect to the Race Directive were subject to public consultation. These amending Regulations do not change the policy contained in the 2003 Regulations; rather they simply provide

greater transparency as to the Race Directive's provisions on indirect discrimination in line with the European Commission's Reasoned Opinion on this matter. Consequently, there is little discretion as to the nature of the amendment to be made to the definition of indirect discrimination. In view of this, Ministers agreed that no further consultation was required.

5. Equality Impact

- 5.1. An equality screening exercise showed that these amending Regulations would have no adverse impact. As the Regulations are necessary to give full effect to the Race Directive, the amendment is bound to have race equality implications. However, the amendment will have a positive impact on the right of "deterred applicants" who previously may have been unclear whether they had a cause of action against organisations that may have indirectly discriminated against them.

6. Regulatory Impact

- 6.1. The impact on business, charities or voluntary bodies is expected to be minimal.
- 6.2. The impact of the amendments on the public sector overall is expected to be minimal.
- 6.3. An Impact Assessment is attached to this Explanatory Memorandum.

7. Financial Implications

- 7.1. As the amendment to the definition of indirect discrimination is clarificatory, the financial impact is expected to be minimal.

8. Section 24 of the Northern Ireland Act 1998

- 8.1. The Department has considered section 24 of the Northern Ireland Act 1998 and is satisfied that the Rule is not incompatible with any of the Convention rights; is not incompatible with Community law; does not discriminate against a person or class of person on the ground of religious belief or political opinion; and does not modify an enactment in breach of section 7 of the Northern Ireland Act 1998.

9. EU Implications

- 9.1. These Regulations are necessary to comply with a Reasoned Opinion of the Commission of the European Communities that the UK had incorrectly transposed relevant provisions of the Race Directive (2000/43 EC).
- 9.2. The Regulations amend the 1997 Order to give full effect in Northern Ireland to Article 2(2)(b) (indirect discrimination) of the Race Directive. A Transposition Note has been prepared and is laid along with the Amendment Regulations and this Explanatory Memorandum.

10. Parity or Replicatory Measure

- 10.1. The corresponding Great Britain Regulations are the Race Relations Act 1976 (Amendment) Regulations 2008 which came into force on 22 December 2008.

11. Additional Information

- 11.1. Not applicable.



Office of the

**First Minister and
Deputy First Minister**

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The Race Relations Order (Amendment) Regulations (Northern Ireland) 2009

Regulatory Impact Assessment

October 2009

1. Title of proposal

- 1.1 This Regulatory Impact Assessment considers the impact on business of the Race Relations Order (Amendment) Regulations (Northern Ireland) 2009.

2. Purpose and intended effect

The objective

- 2.1 These Regulations aim to address an issue raised by the European Commission in respect of indirect discrimination. The Regulations will amend the provisions relating to indirect discrimination on grounds of race or ethnic or national origin in those areas with which Council Directive 2000/43/EC (“the Race Directive”) is concerned, in order to make clear that indirect discrimination covers the ‘deterred applicant’.

The background

- 2.2 EU Member States were required to transpose the Race Directive into domestic law by 19 July 2003. Although much of what was required was already in place in the Race Relations (Northern Ireland) Order 1997, the Directive introduced some new requirements. In order to comply fully with the Directive, the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 were made. However, the European Commission has subsequently expressed the opinion that the UK has not adequately transposed the provisions of the Directive into domestic law in relation to indirect discrimination.
- 2.2 Indirect discrimination on the grounds of race is prohibited under both European and UK law. Indirect discrimination broadly occurs when provisions, criteria or practices, which *prima facie* appear neutral, may have a disproportionately adverse effect on a class of persons protected under discrimination law. It is important to note though, that such provisions, criteria or practices are not unlawful if they can be justified as being a proportionate means of achieving a legitimate aim. For example, a requirement by an employer that his staff be clean-shaven (a no beards policy) while applying to all staff equally and so appearing to be neutral, would, in fact, adversely affect Sikhs. A Sikh employee who is dismissed because he refuses to shave could therefore bring a claim for indirect discrimination and it would be for the employer to show that his policy is justified as being a proportionate means of achieving a legitimate aim.
- 2.3 Article 2(2)(b) of the Race Directive covers the example given above. It also covers the situation where a person is deterred from even applying for a job or seeking access to a good, facility or service because he knows that an apparently neutral provision, criterion of practice will prevent him from being employed or from being provided with the good, facility or service (the ‘deterred applicant’). Using the Sikh example again, if the Sikh man sees an advert for a job for which he is qualified but does not apply because he knows that the company operates a ‘no beards’ policy

which would prevent him getting the job, he will be entitled to bring a claim against that organisation for indirect discrimination.

2.4 Article 2(2)(b) of the Race Directive is not intended to cover allegations of purely hypothetical indirect discrimination. For example, by a person who never intended to apply for the job or is not qualified to do the job.

2.5 In its Reasoned Opinion, the European Commission expressed the concern that the definition of indirect discrimination does not cover the situation outlined above (i.e. the 'deterred applicant'). Article 3(1A) states that:

“A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in paragraph (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but—

(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;

(b) which puts that other at that disadvantage; and

(c) which he cannot show to be a proportionate means of achieving a legitimate aim.”

2.6 The particular part of the provision which the European Commission has taken issue with is Article 3(1A) (b), which seems to the Commission that there should be an actual disadvantage caused before it could be said that discrimination had occurred. The UK's view however, is that the interpretation of this provision is arguable either way.

2.7 Article 29 of the Race Relations (Northern Ireland) Order 1997 (discriminatory advertisements) makes it unlawful to publish advertisements which indicate, or might reasonably be understood as indicating, an intention to discriminate on certain grounds. It would therefore be unlikely that, for example, a business would intentionally discriminate (either directly or indirectly) in the terms which it offers employment or any other service, bearing in mind the provisions of Article 29.

Risk Assessment

2.8 When considering whether domestic law was actually in breach of the obligations under the Race Directive initially it was considered that domestic law in the UK already covered and provided remedies for all instances of indirect discrimination (including the “deterred applicant”). However, given the fact that it is arguable that current legislation does not transpose the provisions of the Directive in a sufficiently transparent

manner, it has been decided to put this matter beyond doubt by making these clarificatory Regulations.

3. Options

Do nothing (option 1)

- 3.1 If we do nothing, the European Commission will refer the matter to the European Court of Justice (ECJ) which will almost certainly rule against us. This will result in time and money being expended on legal action that could have been averted by taking necessary remedial action. Should the ECJ rule against us, which is more than likely, our good record of transposing EU legislation will be blemished.

Promulgate remedial regulations (option 2)

- 3.2 In order to address the European Commission's specific concern about the definition of indirect discrimination in relation to the 'deterred applicant', we should make a clarificatory amendment to the Race Relations (Northern Ireland) Order 1997 (RRO) by promulgating commensurate Regulations.
- 3.3 These Regulations will amend Article 3(1A)(b) of the RRO to make it clear that its provisions cover individuals who are put at a disadvantage by a discriminatory provisions, criterion or practice and also those who *would be put* at a disadvantage (the 'deterred applicant'). The amendment will make it clear that the RRO protects a person who is 'deterred' by a discriminatory provision, criterion or practice from seeking employment for which he or she is qualified or from accessing a good, facility or service for which he or she would otherwise be entitled to receive.

4. Benefits

- 4.1 OFMDFM believes that the second option is necessary and will provide absolute clarity to the existing law on indirect discrimination and ensure compliance with our EU obligation in relation to transposing European Community Directives.
- 4.2 A clearer understanding of the law will enable employers to take the necessary action that will prevent them from falling foul of the law. This in turn will result in averting potential legal costs being incurred and further reduce the burdens on courts and industrial tribunals.
- 4.3 Members of ethnic minority groups, in particular, will benefit from greater clarity that a person who is deterred from applying for employment, or a good, facility or service, by a discriminatory provision or practice can obtain redress.

Other Impact Assessments

- 4.4 When the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 were made, they had a positive impact on the equality of opportunity for people of different racial or ethnic origins. As these amending Regulations are purely clarificatory (and not a new policy) they also will have a positive impact on the equality of opportunity for people of different racial or ethnic origins.
- 4.5 Because we are making Regulations under powers in the European Communities Act 1972 to comply with a Reasoned Opinion of the European Commission, we are restricted in what we can do.

5. Costs

- 5.1 The changes to legislation are clarificatory, not new policy. As such, the cost to businesses will be minimal. We are assuming that it will take minutes for them to familiarise themselves with the change and that only a small percentage of small businesses will do so. Consequently, there will be negligible one-off familiarisation costs applicable to small private and medium to large firms and public bodies (somewhere in the region of about £1.89 - £1.94 per organisation respectively).
- 5.2 For the vast majority of organisations, this clarification will be cost neutral.

Familiarisation costs of amending Regulations

Type of firm	Time required	Unit cost	Cost per firm	No of firms	Total cost
Small firms	1/12 hour (5 mins)	£22.70	£1.89	45,885	£86,723 (+5 as we estimate only 20% of firms will familiarise themselves with this change) £17,345
Medium to large firms	1/12 hour (5 mins)	£23.22	£1.94	1370	£2.658
Public authorities	1/12 hour (5 mins)	£23.22	£1.94	240	£4.66
Total					£20.469

DATA SOURCE

Number of firms

		Number	Data source
Small firms	With employees	45,885	Inter Departmental Business Register June 2008
Medium to large firms	Firms with over 50 employees	1370	Inter Departmental Business Register June 2008
Public bodies		240	Inter Departmental Business Register June 2008

Note: Figures have been rounded to the nearest 5

Wage Costs

	Gross hourly wage	30% uplift non labour costs	Data Source
Small firms			
General administrator/manager	£17.46	£22.70	Annual Survey on Hours and Earnings for Northern Ireland 2008, Code 11
Medium to large firms			
Dedicated personnel manager	£17.86	£23.22	Annual Survey on Hours and Earnings for Northern Ireland 2008, Code 1135
Public bodies			
Dedicated personnel manager	£17.86	£23.22	Annual Survey on Hours and Earnings for Northern Ireland 2008, Code 1135

6. Small Business Impact Test

- 6.1 The proposed amendments to the Race Relations (Northern Ireland) Order 1997 will have no significant cost impact on small businesses other than the familiarisation costs that we have pointed out above.
- 6.2 The proposed amendment is merely a clarification of legislation that has been in existence since 2003. Small businesses therefore already have a duty not to discriminate indirectly and potentially deter prospective job applicants and/or service users from applying for certain jobs or services. Therefore, the provisions of these Regulations will not be introducing any additional burdens on small firms.

7. Enforcement, sanctions

- 7.1 The provisions in these amending Regulations will be enforced by the Equality Commission for Northern Ireland.

8. Monitoring and Review

- 8.1 The reviewing and monitoring of the provisions in these amending Regulations will be undertaken by the Equality Commission for Northern Ireland. The Commission has a duty under Article 42 of the Race Relations (Northern Ireland) Order 1997 to keep under review the working of the Order.

9. Consultation

- 9.1 The Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 which gave effect to the Race Directive were subject to public consultation in 2003.
- 9.2 The proposed amending Regulations are not changing the policy contained in the 2003 Regulations; rather they are simply providing greater transparency as to the Race Directive's provisions on indirect discrimination in line with the European Commission's Reasoned Opinion on this matter. Consequently, there is no discretion as to the nature of the amendment to be made to the definition of indirect discrimination. In view of this and with Ministerial agreement no further consultation has been carried out.

10. Summary

- 10.1 It is estimated that the cost to business of the proposed amendment to the definition of indirect discrimination amounts to around £20,470 (less than £2 per firm on average) as a one-off familiarstion cost.

11. Declaration

We have read the Regulatory Impact Assessment and we are satisfied that the benefits justify the costs.

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First Minister

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deputy First Minister

Date: November 2009

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Transposition note

Council Directive 2000/43/EC of 29 June 2000 ('the Directive') implementing the principle of equal treatment between persons irrespective of racial or ethnic origins.

The Directive prohibits discrimination in the fields of employment, vocational training, social protection, including social security and healthcare, social advantages, education and access to goods and services, including housing, on the grounds of racial or ethnic origins. It is implemented by existing law and these amending Regulations. These Regulations amend the Race Relations (Northern Ireland) Order 1997, as amended by the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003. These Regulations do what is necessary to implement in Northern Ireland the definition of indirect discrimination in the Directive in accordance with the Commission for the European Communities Reasoned Opinion of 29 June 2007.

This table has been prepared by the Office of the First Minister and Deputy First Minister. It sets out the objective of Article 2(2)(b) of the Directive and how it is to be fully implemented in Northern Ireland following the Reasoned Opinion of the Commission of the European Communities. OFMDFM is responsible for each aspect of implementation.

Article of 2000/43/EC	Objective	Implementation
Article 2(2)(b)	Defines indirect discrimination	Regulation 2 amends the Directive based definition of indirect discrimination in Article 3(1A) of the Race Relations (Northern Ireland) Order 1997 so as to make clear that it covers both individuals who are put at a disadvantage by a discriminatory provision, criterion or practice and also those who would be put at a disadvantage.